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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

3 SECURITIES AND EXCHANGE
4 COMMISSION,

5 Plaintiff,

6 New York, N.Y.

7 v.

8 18 Civ. 8175 (ER)

9 BARRY C. HONIG,
10 JOHN STETSON,
11 MICHAEL BRAUSER,
12 JOHN R. O'ROURKE, III,
13 ROBERT LADD,
14 ELLIOT MAZA,
15 BRIAN KELLER,
16 JOHN H. FORD,
17 ATG CAPITAL LLC,
18 GRQ CONSULTANTS, INC.,
19 HS CONTRARIAN INVESTMENTS,
20 LLC,
21 GRANDER HOLDINS, INC.,
22 STETSON CAPITAL INVESTMENTS
23 INC.,

24 Defendants.
25 -----x

September 11, 2019
10:10 a.m.

Before:

HON. EDGARDO RAMOS,

District Judge

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1 APPEARANCES
2

3 SECURITIES AND EXCHANGE COMMISSION

4 BY: NANCY A. BROWN
JACK KAUFMAN
KATHERINE S. BROMBERG

5 RICHARD & RICHARD, P.A.

6 Attorneys for Defendants Brauser and Grander Holdings
BY: DENNIS A. RICHARD (via phone)

7 -and-

8 SALAH ASTARITA & COX, LLC

BY: JAMES D. SALLAH

9 WILMER, CUTLER, PICKERING, HALE & DORR, LLP

10 Attorneys for Defendant Ladd

BY: CHRIS JOHNSTONE

-and-

11 COOLEY, LLP

12 BY: RANDALL R. LEE

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.4 MS. BROWN: Good morning, your Honor. Nancy Brown of
5 the Securities and Exchange Commission, and with me are my
6 colleagues Jack Kaufman and Katherine Bromberg.

7 THE COURT: Good morning.

8 NSPEAK: Good morning.

9 MS. BROMBERG: Good morning.

10 MR. LEE: Good morning, your Honor. Randall Lee for
11 defendant Robert Ladd.12 MR. JOHNSTONE: Good morning, your Honor. Chris
13 Johnstone for defendant Robert Ladd.14 MR. SALLAH: Good morning, your Honor. James Sallah
15 for Mike Brauser and Grander Holdings.16 THE COURT: Good morning to you. And we have someone
17 on the phone?18 MR. RICHARD: Yes, your Honor. Dennis Richard, also
19 for Brauser and Grander.

20 THE COURT: Where are you, Mr. Richard?

21 MR. RICHARD: I am in Miami.

22 THE COURT: Well, welcome.

23 This matter is on for a pre-motion conference. Who
24 wants to go first?

25 MR. JOHNSTONE: Your Honor, I'm happy to go first.

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1 THE COURT: Very well.

2 MR. JOHNSTONE: Your Honor, in the SEC's pre-motion
3 letter they identify four specific items. Since the filing of
4 that letter we believe that, in the main, most of those items
5 have been address and resolved. Today we expect the SEC to
6 pivot and to pose a different question: Whether Mr. Ladd
7 should be required to produce the documents of a separate
8 entity, MGT.

9 To set the table here are some important facts about
10 MGT: First, it is a public company with a fiduciary duty,
11 fiduciary responsibility to shareholders. Second, it has an
12 independent board of directors. Third, it's represented
13 separately in this case by Kramer Levin, Darren LaVerne and
14 Sean Coffey of that firm. Fourth, Kramer Levin has been
15 representing MGT in both the investigative and litigation
16 phases of this case.

17 THE COURT: So MGT is not Company A, Company B or
18 Company C?

19 MR. JOHNSTONE: It is Company B.

20 THE COURT: Okay.

21 MR. JOHNSTONE: And, fifth, none of the engagement
22 between MGT and the SEC has involved Mr. Ladd at all. In fact,
23 until recently, we believed that the parties were on the same
24 page with respect to the document productions of MGT documents.
25 For documents that MGT has, the SEC has sought and obtained

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1 them directly from MGT and Kramer Levin. For documents that
2 MGT does not have, Mr. Ladd has produced, including from two
3 personal e-mail accounts. We believe that this is a sensible
4 approach to document discovery in this case. In fact, it would
5 be unusual for the personal counsel of an individual to insert
6 themselves in document production decisions of a public company
7 with its own capable counsel. We submit the SEC should
8 continue to work directly with MGT as they've been doing and
9 not attempt to seek discrete categories of documents from
10 Mr. Ladd individually.

11 THE COURT: Let me ask you -- you are Mr. Johnstone?

12 MR. JOHNSTONE: Yes, your Honor.

13 THE COURT: The documents that the SEC is seeking from
14 Mr. Ladd, is there any dispute as to their relevance or to
15 their, the fact that they are otherwise properly discoverable?

16 MR. JOHNSTONE: Your Honor, we have not been involved
17 in the back and forth over literally three years between MGT
18 and the SEC over these documents so we don't know the extent to
19 which these documents have already been produced or MGT
20 considers them outside the scope of reasonable discovery. I
21 will say this about the two categories, they are highly
22 questionable. The first category of documents precedes the
23 statute of limitations period in this case. The statute of
24 limitations starts at March 8, 2014. The SEC is seeking
25 documents prior to that date. For that reason it seems like a

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1 highly questionable request.

2 THE COURT: Why? I mean, the fact that the statute
3 only goes back to 2014 doesn't mean that otherwise relevant
4 information or documents go back beyond that date.

5 MR. JOHNSTONE: It is in fact possible that there
6 could be information that is relevant and discoverable. We
7 believe it's highly questionable that the SEC needs documents
8 five years prior to this date.

9 The second category is documents after the end of the
10 allegations in the complaint against Mr. Ladd. Those
11 allegations run up until June 2016. The documents the SEC are
12 seeking are after that date, therefore irrelevant to the claims
13 in this case.

14 THE COURT: Well, irrelevant perhaps to Mr. Ladd
15 but -- well, I don't know, Ms. Brown, why don't you take it?

16 MS. BROWN: Yes, sir.

17 THE COURT: You can remain seated.

18 MS. BROWN: Thank you, your Honor.

19 On the question of relevance, we allege in our
20 complaint that the relationship between Mr. Ladd and Mr. Honig
21 and his group of co-investors began in 2012. That's why our
22 request goes back to that period. If I could explain for a
23 minute about why we are seeking these documents from Mr. Ladd
24 and not MGT, MGT --

25 [audio feedback]

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1 THE COURT: Mr. Richard, are you there?

2 MR. RICHARD: Yes, I am here. I just heard a loud
3 sound.

4 THE COURT: So did we.

5 MR. RICHARD: And now I can't hear anything.

6 THE COURT: Can you hear me?

7 MR. RICHARD: No. Well, I can hear you, but very,
8 very, very dim.

9 THE COURT: Okay.

10 THE COURT: Mr. Richard, can you mute your phone?

11 MR. RICHARD: Yes.

12 THE COURT: Why don't we try that.

13 MR. RICHARD: I am in a quiet room but I will mute my
14 phone.

15 THE COURT: Okay. I will just everyone speak up, just
16 please, please make yourselves heard and be cognizant of madam
17 court reporter. If she asks you to keep your voice up, keep
18 your voice up. Okay?

19 So, Ms. Brown, if you would continue?

20 MS. BROWN: Thank you, your Honor.

21 So, in our back and forth with MGT, which by the way
22 we served that subpoena almost the day that we got our response
23 from Mr. Ladd in which he indicated that he would not produce
24 any documents from MGT, so we served a subpoena to preserve our
25 options that we could pursue documents from MGT directly and

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1 also from Mr. Ladd.

2 In our back and forth with MGT, MGT explained that it
3 had collected, for review and potential production, documents
4 only dating back to, I believe it was October 2013. And so we
5 agreed with them, because they made several protests on the
6 basis of their financial condition, that they not have to go
7 back and collect new documents from an earlier period, that
8 without prejudice we would take what they had already
9 collected. And so, we did that. In the meantime, we sent
10 several e-mails to counsel for Ladd asking them if they had
11 made a request to MGT for authority to produce documents from
12 MGT because, as the Court is aware, the law is that if you have
13 the practical ability to access documents you should produce
14 them, they are within your possession custody, and control.
15 And so, we ask those questions. Ladd did not respond. He has
16 never denied that he could have access to those documents and
17 could ask for authority. We have reason to believe that MGT,
18 given its precarious financial condition, would allow Ladd to
19 shoulder the responsibility to produce those documents --

20 THE COURT: And are these documents that go beyond
21 October 2013? Is that what you are looking for from Mr. Ladd?

22 MS. BROWN: They go back, your Honor, so they go from
23 October 2012, the date on which we allege Mr. Ladd and
24 Mr. Honig began their association.

25 THE COURT: And these are documents that you have not

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1 otherwise gotten from MGT?

2 MS. BROWN: Correct.

3 THE COURT: Okay.

4 MS. BROWN: Correct. We seek no duplication, we
5 simply seek the documents that we think are relevant to this
6 matter.

7 THE COURT: Okay.

8 MS. BROWN: So, that's where we are.

9 So, we ask for the documents from both sides. We have
10 an obligation, as the Court knows, under Rule 5(d)(1), to take
11 into consideration and to take reasonable steps to accommodate
12 non-party subpoena recipients' claims of undue burden, undue
13 expense. So, we have taken MGT at their word that they have
14 spent, according to them, half of their existing cash on
15 responding to our subpoenas and a fact, by the way, that
16 Mr. Ladd is CEO and one of three board members of MGT should be
17 fully aware. And so, we believe that it was appropriate to
18 shift the burden, such as it is, to produce the remaining
19 documents by Mr. Ladd.

20 THE COURT: And Mr. Ladd is currently the CEO of MGT?

21 MS. BROWN: Yes.

22 THE COURT: Do you know whether he has asked for
23 authority to turn over the documents that he may have?

24 MS. BROWN: That's what I have asked, your Honor, and
25 received no response.

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1 THE COURT: Okay.

2 MR. JOHNSTONE: Your Honor, if I could just respond
3 briefly?

4 THE COURT: Certainly.

5 MR. JOHNSTONE: The SEC has indicated that that it has
6 served a subpoena on MGT to preserve its options. I think
7 that's kind of an incomplete depiction what has happened.

8 MGT has been represented by Kramer Levin in this
9 matter since 2016. This is the third bite at the apple for the
10 SEC who has served a subpoena during the investigation,
11 received thousands of documents, served a subpoena during this
12 litigation, received 8,000 pages of documents. Now the SEC
13 wants a third bite at the apple through Mr. Ladd. Mr. Ladd is
14 the CEO of MGT but he is one among three directors, the other
15 two of which are independent. In the SEC's letter they don't
16 cite a single case in support of their position that personal
17 counsel of an individual should insert themselves in the
18 production decisions of a public company.

19 THE COURT: Explain that to me. Why is that? Because
20 this is the second time you have said it and I don't understand
21 how it is relevant to whether or not Mr. Ladd has an obligation
22 to produce documents that are arguably relevant and within his
23 custody and control.

24 MR. JOHNSTONE: It is important to understand that MGT
25 is represented separately in this action. They have

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1 independent counsel because their interests and Mr. Ladd's
2 interests may not always align. That's why MGT retained Kramer
3 Levin to produce these documents.

4 THE COURT: Okay.

5 MR. JOHNSTONE: The case law in the Second Circuit is
6 pretty clear. If you look at the case that we cite, which is
7 the *Shcherbakovskiy* case, the Second Circuit identifies
8 specific factors to look at new these precise circumstances,
9 one of which is whether the entity is an alter ego of the
10 individual. Certainly not the case here; Mr. Ladd owns a
11 fraction of a percent of MGT stock. It also looks into whether
12 he indisputably controls the board of that company. That's the
13 language that the Second Circuit used. That's clearly not the
14 case here. And so, the SEC has been engaged with MGT for years
15 at this point. MGT has capable counsel, just uptown. They
16 have a document review system that they're going through and to
17 insert Mr. Ladd into the system at this late hour makes no
18 sense in terms of process and it makes no sense in terms of
19 cost.

20 THE COURT: So, is MGT aware of the subpoena that's
21 been issued to Mr. Ladd?

22 MR. JOHNSTONE: Yes, they are.

23 THE COURT: Have they objected? Have they moved to
24 quash the subpoena?

25 MR. JOHNSTONE: As I said they haven't been involved

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1 in our discussions with the SEC and the SEC hasn't involved us
2 in their discussions with MGT.

3 THE COURT: Are they aware of the requests that are
4 being made in the subpoena?

5 MR. JOHNSTONE: In the document request to us?

6 THE COURT: Yes.

7 MR. JOHNSTONE: If they're following the docket they
8 are.

9 THE COURT: Okay.

10 MR. JOHNSTONE: And I believe that they are.

11 THE COURT: So, I guess your concern is whether or not
12 MGT's rights are somehow being slighted. But, if they are
13 aware of the subpoena to Mr. Ladd, and I absolutely agree they
14 have very, very competent counsel, that if they have objection
15 to it I think that they would have come to me and tried, as a
16 third-party, to quash that subpoena because of their particular
17 interests. If that hasn't happened why should I be concerned
18 about the issue that you have raised?

19 MR. JOHNSTONE: It's quite possible that they haven't
20 looked at the precise issue here. Your Honor, the pre-motion
21 letter that was filed focused on four other discrete issues, it
22 didn't focus specifically on the issue of whether an individual
23 should have to produce MGT's documents.

24 THE COURT: I think Kramer Levin probably could figure
25 that out. I haven't heard anything suggesting that the

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1 documents are not relevant, nor have I heard anything
2 suggesting that the requests are burdensome or unduly
3 burdensome or that Mr. Ladd should not be made to produce them
4 for traditional issues so I will direct Mr. Ladd to turn over
5 the documents that are requested.

6 Next?

7 MS. BROWN: Sorry, your Honor. I was about to stand
8 up again.

9 I think the other issue before you this morning is the
10 issue of our non-public investigation which we wrote to you
11 about on August 8th and received responses from the defendants.
12 We then provided you a letter more recently with the case law
13 that sets out why we are able to do that. I am here this
14 morning to discuss those issues to the extent I can. I am
15 happy to talk to the Court *in camera* about the specifics of the
16 non-public investigation. I am not at liberty to disclose
17 those on the open record.

18 THE COURT: Who wants to speak on behalf of
19 defendants? What is the bottom line?

20 MR. LEE: Yes, your Honor. Randall Lee for Mr. Ladd,
21 and I believe Mr. Sallah would like to be heard on this issue
22 as well, but I will start.

23 THE COURT: Very well.

24 MR. LEE: Your Honor, we have two concerns about the
25 posture of the SEC's filing with the Court on August 8 and

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1 their putting the court, the parties, and the public on notice
2 of an ongoing investigation. In the first, the fact that the
3 letter was filed publicly was, in and of itself, highly
4 unusual, highly irregular, gratuitous, and contrary to
5 long-standing SEC practice and protocol that it's ongoing
6 investigations are non-public. For the SEC to, out of the
7 blue, to have filed a public letter stating that one or more of
8 the defendants is under another purportedly unrelated
9 investigation was highly prejudicial, it was unnecessary, and
10 harmful to our client's reputations.

11 On the merits, on the substance of the SEC's position,
12 our second concern is that there simply is no ability for us to
13 sort of understand and test the SEC's assertions that its
14 ongoing investigation is truly unrelated. And this is, your
15 Honor, to be clear, this is not the ordinary case, this is a
16 highly unusual circumstance, and just to give Court a few
17 examples, the SEC's investigation was sweeping and expansive in
18 nature. Its initial disclosures in this matter run 25 pages
19 and identify that it obtained documents during its
20 investigation from 106 entities and parties. The complaint
21 itself identifies a broad range of purported misconduct far
22 beyond what's actually alleged in the complaint.

23 The amended complaint, at paragraph 55 states that
24 there were 19 issuers, as opposed to the three named in the
25 complaint, as to whom Mr. Honig and others purportedly engaged

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1 in manipulative conduct. It identifies 40 issuers as between
2 Mr. Honig and Mr. Brauser, it identifies 65 issuers between
3 Honig and Stetson, and it identifies, at paragraph 63, 75
4 issuers. And, keep in mind, there are only three alleged by
5 name in the complaint as Companies A, B, and C but the
6 complaint specifically alleges that Mr. Honig and Mr. O'Rourke
7 co-invested in 75 different issuers.

8 And so, under these circumstances, the notion that we
9 should simply accept the SEC's representation that whatever
10 else it is still doing after a four-year long investigation is
11 unrelated to the charges and the allegations at hand I think is
12 quite frankly, hard to accept. And so, what we are asking for,
13 is some mechanism. We have proposed that the SEC identify,
14 under seal to the parties, the names of the additional targets
15 or subjects of their ongoing investigation and the nature of
16 their ongoing investigation, and so on, so at least we have
17 some ability to understand and test the SEC's assertion that
18 this is unrelated.

19 THE COURT: Well, I mean, let me ask you this,
20 Mr. Lee, and I will ask Ms. Brown because I actually don't know
21 whether or not this is as unusual as you have indicated, that
22 this is highly unusual, and I guess a part of what you mean is
23 that, in the ordinary course, if, for example, your client were
24 under investigation, you would have no right to know whether or
25 not he was under investigation or what the SEC was

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1 investigating or what documents he or she may have had that may
2 be sought. Now, they did send this letter to me, it is a
3 public document, but why does this change the parties' rights
4 on the facts of this case?

5 MR. LEE: I think it changes the parties' rights
6 precisely because there is ongoing litigation and the SEC is
7 vowing to abide by the Federal Rules of Civil Procedure in its
8 conduct of discovery as to matters within the scope of this
9 litigation. And the reason I pointed out the expansive scope
10 of this litigation is that it is hard to conceive for us that
11 they could be independently and legitimately conducting
12 additional investigation that has no relevance whatsoever to
13 the claims here.

14 THE COURT: Okay.

15 MR. LEE: So, what the SEC is seeking to do and, in
16 theory the SEC is correct, their citation of *Iqbal* is correct,
17 in theory they are allowed to conduct -- to use their
18 administrative authority even during the pendency of the
19 litigation. What is unusual about this circumstance is two
20 things. Number one, the fact that they chose to file a public
21 letter about it; and number two, the fact that given the
22 breadth and expansiveness and scope of the claims in this case
23 they're still claiming that additional investigation is
24 unrelated and we should just take their word for it.

25 THE COURT: Mr. Sallah?

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1 MR. SALLAH: Yes, your Honor.

2 To echo that, the SEC's own internal manuals
3 understand and the Courts can conclude, as you know, the use of
4 investigative subpoenas -- which are akin to a grand jury
5 subpoena, they're non-public -- could be viewed as a misuse of
6 the SEC's investigative powers and that could circumvent their
7 rights, of course, to limit discovery and the Federal Rules of
8 Civil Procedure, which have their own limits on discovery, just
9 to echo a little bit about the distinction between litigation
10 and an investigative subpoena, and when they're parallel, there
11 is potential conflicts.

12 Now, Ms. Brown did address, in a letter to us on
13 September 4th, she said that the Commission is not using
14 administrative subpoenas to take any discovery related in this
15 case. Rather, as noted in the letter, the Commission plans to
16 use its administrative powers to investigate matters
17 unrelated -- and they highlighted, underlined "unrelated"-- to
18 this case.

19 So, you look at the amended complaint and it talks
20 about a pattern. Repeatedly it talks about a pattern. And in
21 the opposition to the response to our motion to dismiss they
22 talk about a pattern going back 40, in some instances 65
23 different cases.

24 So, we would like to know if the present
25 investigation, which is distinct, unrelated, and involves

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1 conduct post the allegations of the complaint, it must be some
2 conduct that does not fall within that pattern that they
3 describe -- taking control of an issuer, pumping up the stock,
4 and then liquidating the stock, dumping the stock. So, I can't
5 imagine what it could be because if it is truly unrelated, it
6 has got to be something else. Otherwise -- otherwise, right --
7 the evidence can be gathered using investigative process to
8 establish 406 evidence, modus operandi, habit, practice, course
9 of conduct which, again, is what we are concerned about.
10 However, if it does go to the pattern described by the
11 Commission, this other investigation involves issuers then
12 acquiring a block of stock, pumping up the stock, disseminating
13 false information, and then dumping the stock, it is related
14 and Ms. Brown's representations to us and the Court that
15 they're unrelated are just simply not candid. That is why we
16 simply want to find out more.

17 THE COURT: Very well.

18 Ms. Brown?

19 MS. BROWN: Yes, your Honor.

20 THE COURT: First of all, let me ask you this. The
21 August 8 letter -- I don't do this every day, you do -- how
22 usual is this letter?

23 MS. BROWN: Not that unusual, your Honor, and I will
24 tell you how it usually comes up.

25 We write those letters in situations like this one

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1 where a new non-public investigation has been undertaken
2 precisely to give the Courts and the parties an opportunity to
3 have this discussion but also because, in our experience,
4 typically the defendant about whom this non-public
5 investigation is focused finds out about it and comes to the
6 Court and complains that we are using our administrative powers
7 to defeat the rules of the Federal Rules of Civil Procedure.
8 So, we always think it makes more sense to alert parties and
9 the Court to this issue and we have done so in many cases. I
10 neglected to bring those cases with me this morning to tell you
11 about them but I am happy to submit a letter with additional
12 cases in which we have done a similar thing.

13 THE COURT: Okay. Why don't do you that.

14 MS. BROWN: Sure. Okay.

15 As I say, sometimes it arises where the defendant
16 brings the issue to the Court but I will include those as well.

17 With respect to the unrelated and post-dated nature of
18 the new non-public investigation, I am afraid I really can't
19 say more -- and I said this in an e-mail to Mr. Sallah this
20 morning -- I can't say more than that without doing exactly
21 what Mr. Lee complains that I have already done, which is
22 disclose the nature of the non-public investigation. We don't
23 do that as a matter of policy. We don't do that for several
24 reasons. One is we don't want defendants and others to know
25 what our investigative steps that we may be taking are, but

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1 also because we don't want the public to know that we are
2 investigating people against whom we may never bring charges.

3 So, that is why I am circumspect in addressing
4 Mr. Sallah and Mr. Lee's complaint about not knowing what the
5 nature of the investigation is. But, again, I am happy to
6 offer that information to the Court in camera.

7 THE COURT: Why don't we do this. We will do that, we
8 will take a moment to do that but I want the parties' input as
9 to what representations could be made on the record to address
10 the defendant's concerns that the investigation truly is
11 separate and distinct and that the SEC is not misusing its
12 administrative powers. So, let's think about that. In the
13 meantime, I can see plaintiffs in the robing room.

14 Give us 5, 10 minutes. Don't go far.

15 (Pages 21-24 SEALED and EX PARTE FOR PLAINTIFF ONLY,
16 by order of the Court)

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1 THE COURT: Everyone can be seated. We are back on
2 the record.

3 And so, the parties are aware that the *in camera*
4 *ex parte* meeting that I just had with plaintiff's counsel is
5 under seal and I will advise the parties that I have directed
6 the SEC to submit additional briefing which will be also
7 *ex parte* and under seal to me so that I can further make a
8 determination as to whether or not the investigation is wholly
9 unrelated to the current investigation, and that submission is
10 due by next week, the 18th.

11 Is there anything else that we can discuss with
12 respect to that issue, anything else that defendants wish to
13 raise?

14 MR. LEE: Well, your Honor, just briefly.

15 The Court asked counsel about the regularity of this
16 letter. In my experience I have never seen anything like it
17 before but I will accept Ms. Brown's representation that they
18 have done this in other cases. What she didn't explain is why
19 they chose to file it publicly. That was completely
20 unnecessary, they could have filed it under seal. They could
21 have sent a letter. If the whole idea was to put counsel, the
22 defense on notice, they could have simply sent us a letter, but
23 the fact that they chose to file something publicly, I have
24 never seen anything like it and I think was unnecessary and
25 gratuitous at the very best.

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1 THE COURT: Well, Ms. Brown has indicated that she
2 will be submitting something indicating that in fact the SEC,
3 that it is not unusual for the SEC to issue such letters.

4 And I take it, Ms. Brown, that when the SEC has done
5 this in the past it has been a public filing?

6 MS. BROWN: Yes.

7 THE COURT: Okay. So, there we have it.

8 Mr. Lee, you obviously can make whatever application
9 you want. If you believe that your client's substantial rights
10 have been affected in any adverse fashion, make whatever
11 application you feel is necessary.

12 Mr. Sallah, anything else you wanted to say?

13 MR. SALLAH: One moment?

14 THE COURT: Yes.

15 (Counsel conferring)

16 MR. SALLAH: Your Honor, one thing we discussed while
17 you were *in camera*, if your Honor does determine that these are
18 wholly unrelated matters after his review of the briefing *in*
19 *camera*, we would only ask that some protocols could be put in
20 place so that, for example, if they're completely unrelated,
21 that the evidence gathered and the distinct and unrelated
22 investigation could not be used in this case to establish
23 practice, habit or, your Honor, they're seeking injunctive
24 relief and, unlike private civil litigants injunctive relief
25 for the SEC, they have to show substantial likelihood of future

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1 harm. And so, we would not want an investigation gathering
2 post-dated conduct or post-allegation conduct to come into play
3 here to try to establish an injunction if that's what they're
4 trying to do.

5 THE COURT: Let me ask Ms. Brown. Ms. Brown, does the
6 SEC have protocols currently in place, standard protocols to
7 prevent what Mr. Sallah is concerned about, which is to say,
8 well, you say that it is completely unrelated and it is an
9 investigation and you are gathering documents and what is to
10 prevent you from then using those documents and prosecuting
11 this case?

12 MS. BROWN: Well, as I think I said in my letter, if
13 there are documents that are produced to us that are related to
14 this case, we will produce them to the defendants. We can't
15 control what people produce to us and there may be documents
16 that we, after reading their document request, deem relevant to
17 this case and we will produce them.

18 THE COURT: Okay. As I have indicated, the plaintiffs
19 will be submitting something *ex parte* and under seal. If the
20 defendants wish to submit anything you can also make a
21 submission making requests of that type, then we will give the
22 SEC an opportunity to respond.

23 MR. SALLAH: Thank you.

24 THE COURT: Very well.

25 Anything else?

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1 MR. LEE: Your Honor, we have, both us and
2 Mr. Brauser, have filed motions to dismiss. We have also filed
3 requests for oral argument in this case. I think we had
4 reached an agreement with counsel for SEC on a proposed date if
5 it were available for the Court and it has now been fully
6 briefed so I wanted to raise it for the Court.

7 THE COURT: I typically don't have oral argument
8 unless there is a particular issue that I need further
9 explication on. So, why don't we hold off on that and if I
10 require oral argument, I will let the parties know, and I will
11 also give you an idea of what I am concerned about.

12 MS. BROWN: Thank you, your Honor.

13 MR. LEE: Thank you, your Honor.

14 THE COURT: Very well. I believe that's all that we
15 needed to discuss today. Is that right?

16 MR. LEE: Yes, your Honor.

17 MS. BROWN: Yes, your Honor.

18 THE COURT: We are adjourned. Thank you, folks.

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